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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THOMAS KIM,

Plaintiff and Appellant,

v.

JAY WOO et al.,

Defendants and Respondents.

B210941

(Los Angeles County
Super. Ct. No. BC380912)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Robert L. Hess, Judge. Affirmed.

Juan Hong for Plaintiff and Appellant.

Aidan Butler for Defendants and Respondents.

* * * * *

Appellant Thomas Kim appeals from a judgment of dismissal following the sustaining of a demurrer without leave to amend his second amended complaint (SAC) against respondents Jay Woo (Woo), Paul Yun (Yun) and Horus, Inc. (Horus) for fraud, intentional interference with contractual relations and conspiracy. We affirm. We find no merit to appellant's arguments that respondents were barred from filing the demurrer to the SAC and that the form of the court's judgment requires reversal. We also conclude that the trial court correctly determined that the SAC fails to state a cause of action.

FACTUAL AND PROCEDURAL BACKGROUND

On appeal from a judgment of dismissal following a demurrer sustained without leave to amend, we assume the truth of all well-pleaded facts, as well as those that are judicially noticeable, but not contentions, deductions or conclusions of fact or law. (*Howard Jarvis Taxpayers Assn. v. City of La Habra* (2001) 25 Cal.4th 809, 814; *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

The SAC alleges the following: Horus was incorporated in December 2005 operating a business distributing Helio cell phones. Jarvis Park (Park), who is not a party to this appeal, and appellant "initiated acquiring the partnership with Helio," and Park decided to bring in respondents Woo and Yun. Appellant contributed \$50,000 and owned 25 percent of Horus's shares.

In order to purchase more cell phones, appellant, Woo and Yun agreed to contribute additional personal funds in the amount of \$150,000 each. Woo and Yun contributed their funds in June 2006. Because appellant did not have the funds at that time, he decided to refinance his house. Woo recommended that appellant refinance through a friend of Woo's, who was a mortgage broker. Through Woo's friend, appellant secured refinancing funding, with escrow set to close July 19, 2006. Woo, Yun and Park "were aware of this fact."

On July 11, 2006, Park told appellant that he would get "a cheap loan of approximately \$150,000" on behalf of appellant from a friend in South Korea. Park knew this representation was false or made it recklessly without regard for the truth to

persuade appellant to cancel his escrow, and Woo and Yun “conspired with Defendant Jarvis Park to misrepresent.” Relying on Park’s assurance, on or around July 13, 2006, appellant canceled his escrow.

At a “board” meeting on July 14, 2006 between appellant, Woo, Yun and Park, appellant was coerced into signing a “resolution” requiring him to deposit his \$150,000 contribution by July 25, 2006. From July 19 through July 24, 2006, Park was allegedly in South Korea to acquire the funding and appellant was unable to get in touch with him. It was not until appellant went to Park’s house that he learned the funding was not going to happen, which left appellant less than 24 hours to meet his deadline, which he could not do. On July 25, 2006, appellant was voted out of Horus as a result of failing to contribute \$150,000 as agreed to by the “shareholder agreement.” Woo and Yun tried to escort appellant out of the office, while Park was threatening appellant and his family.

On July 25, 2005, Park, Woo and Yun signed a notification to a third party stating that appellant was no longer part of Horus “as of end of day on July 25, 2006.” The following day, Woo and Yun told appellant that if he tried to sue them, they would “bring up embezzlement issue” and appellant would be prosecuted for embezzlement.

Appellant’s original complaint alleged 11 causes of action. After respondents demurred to the original complaint on the ground that it failed to state a cause of action, appellant filed a first amended complaint (FAC) prior to the hearing on the demurrer. Respondents then filed an answer to the FAC and Park demurred to the FAC. Park’s demurrer to the FAC was sustained with leave to amend and appellant filed the SAC, which alleges causes of action for intentional and negligent misrepresentation, intentional interference with contractual relations and conspiracy. This time, Park answered the SAC and respondents demurred to the SAC on the ground that it failed to state a cause of action. The trial court agreed, sustained the demurrer to the SAC without leave to amend, and entered a judgment of dismissal as to Woo, Yun and Horus. This appeal followed.

DISCUSSION

I. Standard of Review.

We review de novo a trial court's sustaining of a demurrer, exercising our independent judgment as to whether the complaint alleges sufficient facts to state a cause of action. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.) We assume the truth of properly pleaded allegations in the complaint and give the complaint a reasonable interpretation, reading it as a whole and with all its parts in their context. (*Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 558.) We apply the abuse of discretion standard in reviewing a trial court's denial of leave to amend. (*Blank v. Kirwan, supra*, 39 Cal.3d at p. 318; *Hernandez v. City of Pomona* (1996) 49 Cal.App.4th 1492, 1497–1498.) The plaintiff bears the burden of proving there is a reasonable possibility that the defect can be cured by amendment. (*Blank v. Kirwan, supra*, at p. 318; *Zelig v. County of Los Angeles, supra*, at p. 1126.)

II. Respondents Were Not Barred From Filing the Demurrer and Code of Civil Procedure Section 472d Does Not Require Reversal.

Before turning to the issue of whether the SAC alleges sufficient facts to state a cause of action, appellant argues that respondents were barred from filing the demurrer and that Code of Civil Procedure section 472d requires reversal of the judgment. These arguments are without merit.

Appellant first argues that respondents were judicially estopped from filing a demurrer to the SAC after they had filed a demurrer to the original complaint and an answer to the FAC because in engaging in this “demurrer-answer-demurrer” procedure they took “inconsistent positions in the same judicial proceeding.” Initially, we note that appellant points to no place in the record showing that he made this argument to the trial court. We do not ordinarily consider issues and arguments not raised below. (*Bialo v. Western Mutual Ins. Co.* (2002) 95 Cal.App.4th 68, 73.) But even were we to reach the

issue as involving a pure legal question based on an undisputed procedural history, we find it unmeritorious.

As explained in *M. Perez Co., Inc. v. Base Camp Condominium Assn. No. One* (2003) 111 Cal.App.4th 456, 463 (the only case cited by appellant to support his argument), judicial estoppel is an equitable doctrine aimed at preventing fraud on the courts and prohibits a party from taking inconsistent positions in the same or different judicial proceedings. But that case did not involve the procedural situation presented here. The plaintiff in that case claimed the defendant was judicially estopped to deny that the parties' agreement contained a prevailing party attorney-fee provision when the defendant requested attorney fees. Those are not our facts. Appellant cites no authority for the proposition that a party who files a demurrer to an original complaint and an answer to a subsequent complaint is judicially estopped from then demurring to yet a subsequent complaint. As respondents point out, a party can answer a complaint and later file a motion for judgment on the pleadings, which acts as a demurrer, challenging the very same pleading to which the party filed an answer. (See Code Civ. Proc. § 438, subds. (c)(1)(B) and (f)(2); *Barker v. Hull* (1987) 191 Cal.App.3d 221, 224 [motion for judgment on the pleadings performs the functions of a general demurrer].) Moreover, here the responsive pleadings themselves did not take inconsistent positions. The first affirmative defense set forth in the answer to the FAC was that the FAC failed to state a cause of action. This was the same basis for the demurrers to both the original complaint and the SAC.

Appellant next argues that respondents were barred by the doctrine of "direct estoppel" from filing their demurrer to the SAC because the issues asserted in the demurrer to the SAC could have been asserted in respondents' demurrer to the original complaint and therefore respondents' answer to the FAC precludes further consideration of these issues. Although appellant did raise this argument below, he misunderstands the doctrine of direct estoppel. "Most commonly, issue preclusion arises from successive suits on different claims; this is referred to as collateral estoppel. If, however, the second

action is on the same claim, as in this case, issue preclusion based on the earlier determination is described as ‘direct estoppel.’ [Citations.]” (*Sabek, Inc. v. Engelhard Corp.* (1998) 65 Cal.App.4th 992, 997.) “In either of its forms, issue preclusion should be determined according to certain threshold requirements: ““First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding.” [Citations.]” (*Id.* at pp. 997–998.)

These requirements are not met here. None of the issues raised in the demurrer to the SAC were “necessarily decided” in connection with the demurrer to the original complaint or the answer to the FAC. The record shows that appellant voluntarily amended his original complaint prior to any hearing on the demurrer to the original complaint. And nothing was litigated or decided with respect to respondents’ answer to the FAC. The doctrine of direct estoppel therefore has no application here.

Appellant also argues that respondents were barred from filing the demurrer to the SAC because they did not file it at the same time as their answer. Appellant cites to Code of Civil Procedure section 472a, subdivision (a), which provides that “[a] demurrer is not waived by an answer filed at the same time.” But appellant’s argument ignores that the answer was filed in response to one pleading and the demurrer was filed in response to another pleading. Appellant’s argument is therefore without merit.

Finally, appellant argues that the judgment must be reversed because it did not comply with Code of Civil Procedure section 472d, which states that whenever a demurrer is sustained, “the court shall include in its decision or order a statement of the specific ground or grounds upon which the decision or order is based which may be by reference to appropriate pages and paragraphs of the demurrer.” Although appellant is correct that the judgment did not state the grounds upon which the demurrer was

sustained, appellant completely ignores that the trial court’s minute order set forth the specific grounds for sustaining the demurrer: “After three attempts, plaintiff still has not set forth the alleged misrepresentation by the moving parties, no[r] the nature of the interference with these contractual obligations, nor how any of the parties allegedly conspired, no[r] any basis for liability of Horus, which can imply an act by its officers, directors or employees.” “The court’s direction, entered in writing in the minutes, constitutes an order. (Code Civ. Proc., § 1003.)” (*Stevenson v. San Francisco Housing Authority* (1994) 24 Cal.App.4th 269, 275 [finding no error in stating the grounds for the court’s decision sustaining demurrer where minute order adopted the court’s tentative order and stated “failure to state a cause of action”].)

Moreover, a trial court’s failure to specify the grounds for sustaining a demurrer is not necessarily reversible error. ““The court sustained defendants’ demurrer without leave to amend in general terms, contrary to Code of Civil Procedure section 472d. Regardless of this error, the court’s ruling will be upheld if any of the grounds stated in the demurrer is well taken.”” (*Muraoka v. Budget Rent-A-Car, Inc.* (1984) 160 Cal.App.3d 107, 114–115.) As discussed below, the demurrer was well taken.

III. The SAC Fails to State a Cause of Action.

Turning now to the issue of whether the SAC sets forth sufficient facts to state a cause of action, we conclude that it does not.

A. Intentional Misrepresentation

The first cause of action for intentional misrepresentation is alleged against Park and respondents Woo and Yun, but not Horus. “The elements of intentional misrepresentation, or actual fraud, are: ‘(1) misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity (scienter); (3) intent to defraud (i.e., to induce reliance); (4) justifiable reliance; and (5) resulting damage. [Citation.]”’ (*Anderson v. Deloitte & Touche* (1997) 56 Cal.App.4th 1468, 1474.) “In California,

fraud must be pled specifically; general and conclusory allegations do not suffice.” (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645.) The normal policy of liberally construing pleadings against a demurrer will not be invoked to sustain a fraud cause of action that fails to set forth such specific allegations. (*Ibid.*) ““This particularity requirement necessitates pleading *facts* which “show how, when, where, to whom, and by what means the representations were tendered.”” (*Ibid.*) Thus, “every element of the cause of action for fraud must be alleged in full, factually and specifically.” (*Wilhelm v. Pray, Price, Williams & Russell* (1986) 186 Cal.App.3d 1324, 1331.) The specificity requirement serves two purposes: (1) to furnish the defendant with certain definite charges that can be intelligently met, and (2) to ensure the complaint is specific enough so that the court can “weed out nonmeritorious actions on the basis of the pleadings.” (*Committee on Children’s Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 216–217.)

The only misrepresentation alleged in the SAC was that made by Park to appellant that Park would get a “cheap loan” for appellant from a friend in South Korea. There are no alleged misrepresentations on the part of Woo or Yun. While the SAC alleges that Woo and Yun “conspired with Defendant Jarvis Park to misrepresent,” this is a pure conclusion devoid of any factual detail. It was also contradicted by the allegation that Woo had arranged for the initial refinancing that would have enabled appellant to contribute his required \$150,000 investment.

Moreover, the SAC contains no factual allegations showing appellant’s justifiable reliance on Park’s assurance that he could get appellant a loan. The SAC simply makes the conclusion that appellant “reasonably relied” on Park’s alleged misrepresentation. But “the mere assertion of ‘reliance’ is insufficient. The plaintiff must allege the specifics of his or her reliance on the misrepresentation to show a bona fide claim of actual reliance. [Citation.]” (*Cadlo v. Owens-Illinois, Inc.* (2004) 125 Cal.App.4th 513, 519.) Thus, the SAC fails to state a cause of action for intentional misrepresentation against respondents Woo and Yun.

B. Negligent Misrepresentation

The second cause of action for negligent misrepresentation is alleged against all defendants, including Horus. “The tort of negligent misrepresentation does not require scienter or intent to defraud.” (*Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 173.) A claim for negligent misrepresentation arises when a person makes a false statement with the honest belief that the statement is true, but without a reasonable basis for that belief. (*Id.* at pp. 173–174; 5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 818, p. 1181.) The elements of negligent misrepresentation also include justifiable reliance on the representation, and resulting damage. (*B.L.M. v. Sabo & Deutsch* (1997) 55 Cal.App.4th 823, 834; see also *Fox v. Pollack* (1986) 181 Cal.App.3d 954, 962 [“Negligent misrepresentation is a form of deceit, the elements of which consist of (1) a misrepresentation of a past or existing material fact, (2) without reasonable grounds for believing it to be true, (3) with intent to induce another’s reliance on the fact misrepresented, (4) ignorance of the truth and justifiable reliance thereon by the party to whom the misrepresentation was directed, and (5) damages”].)

The negligent misrepresentation claim is based on the same allegations that constitute the intentional misrepresentation claim. For the same reasons we find that claim to be insufficient against Woo and Yun, we likewise find the negligent misrepresentation claim against them to be insufficient.

With respect to Horus, the SAC simply alleges that Horus “is vicariously liable for it[s] officers’ negligent acts.” But this is a legal conclusion, not an assertion of fact. Moreover, even were we to assume that this is a viable legal theory, the SAC contains no factual allegations to support it. There are no allegations that the alleged misrepresentation by Park was made in his capacity as an officer of Horus with the authority or intent to bind the company, rather than in his individual capacity. Indeed, the alleged misrepresentation does not even involve the company. Park did not allege that Horus would provide a loan to appellant, but that a *personal friend* of Park’s would

supply the loan. We therefore conclude that the SAC fails to state a cause of action for negligent misrepresentation against any of the respondents.

C. Intentional Interference with Contractual Relations

The third cause of action for intentional interference with contractual relations is alleged against Park and respondents Woo and Yun, but not Horus. “The elements which a plaintiff must plead to state the cause of action for intentional interference with contractual relations are (1) a valid contract between plaintiff and a third party; (2) defendant’s knowledge of this contract; (3) defendant’s intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage.” (*Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1126.)

The contract allegedly interfered with is described in the SAC as between “[appellant] Thomas Kim and Horus, Inc.,” and is attached as exhibit 1 to the SAC. Exhibit 1 is a document entitled “Minutes of Meeting of Shareholders of Horus, Inc.,” and reflects that at a July 14, 2006 meeting of shareholders, including appellant, it was resolved that appellant would deposit his \$150,000 contribution, plus \$10,288 that appellant was described as having embezzled, by July 25, 2006, and that appellant would deliver any shares, interests or rights in the company to the remaining shareholders as of that date if he failed to make the deposit. Exhibit 1 is signed by appellant, Park, Woo and Yun in their capacities as shareholders. The SAC refers to exhibit 1 variously as a “resolution” and as “a shareholder agreement.”

It thus appears from exhibit 1 that the agreement at issue was not between appellant and Horus, as alleged by the SAC, but between appellant and respondents as shareholders of Horus. It is well established that a party cannot be held liable for interfering with its own contract. (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 513–514.)

Even if exhibit 1 could somehow be construed as a contract between appellant and Horus, the SAC contains no factual allegations of intentional acts by Woo and Yun designed to interfere with the contract. The only factual allegation of wrongdoing is Park's representation to appellant that he would get a cheap loan on behalf of appellant through a friend in South Korea. With respect to Woo and Yun, the SAC merely alleges that they conspired with Park to take away appellant's share of stock and to divide it among themselves. But such an agreement was not a conspiracy of which appellant was ignorant; rather, it was the very terms of the shareholder agreement to which appellant expressly agreed. Thus, the SAC fails to state a cause of action for intentional interference with contractual relations against Woo and Yun.

D. Conspiracy

The fourth cause of action is for conspiracy against Park and respondents Woo and Yun. But as the SAC itself acknowledges, conspiracy is not an independent tort. Rather, conspiracy is "a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration." (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.*, *supra*, 7 Cal.4th at pp. 510–511.) Because all of the conspiracy allegations set forth in the SAC are mere conclusions without factual support, the SAC provides no basis for holding Woo and Yun liable on a theory of conspiracy.

IV. There is No Basis for Leave to Amend.

Appellant contends that the trial court abused its discretion in sustaining the demurrer without leave to amend. Appellant is correct that he was not required to seek leave to amend in the trial court before making such a request on appeal. (Code Civ. Proc., § 472c, subd. (a); *Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43.) But to satisfy his burden on appeal of showing a reasonable possibility that an amendment will cure the defects, appellant must not only set forth the

legal basis for amendment, but ““must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading.”” (*Rakestraw, supra*, at p. 43, quoting *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) The plaintiff must set forth factual allegations that sufficiently state all required elements of the challenged causes of action, and the allegations “must be factual and specific, not vague or conclusionary.” (*Rakestraw, supra*, at pp. 43–44.) Appellant has failed to do so on appeal. “Where the appellant offers no allegations to support the possibility of amendment and no legal authority showing the viability of new causes of action, there is no basis for finding the trial court abused its discretion when it sustained the demurrer without leave to amend.” (*Id.* at p. 44.)

DISPOSITION

The judgment is affirmed. Respondents are entitled to their costs on appeal.

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_____, Acting P. J.

DOI TODD

We concur:

_____, J.

ASHMANN-GERST

_____, J.

CHAVEZ